INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	3
Argument	11
Conclusion	13

CITATIONS

Statutes:

18 U.S.C. 2	7
21 U.S.C. 176	3
26 U.S.C. 4744(a)(2)	3

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 33	2, 11, 13

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 479

EDWARD EARLE BECK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R. 535-548) is reported at 317 F. 2d 865.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1963 (Pet. App. B; R. 549). A petition for rehearing was denied on July 22, 1963 (Pet. App. C; R. 603). On July 30, 1963, Mr. Justice Black

extended the time for filing a petition for a writ of certiorari to and including September 20, 1963, and the petition was filed on September 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, where no motion for a new trial had been made in the district court, the court of appeals erred in declining, on petition for rehearing, to reverse petitioner's conviction or to order an inquiry upon petitioner's allegations that newly discovered evidence showed that he had been denied a fair trial.

RULE INVOLVED

Rule 33 of the Federal Rules of Criminal Procedure provides:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty, or within such further time as the court may fix during the 5-day period.

STATEMENT

In the United States District Court for the Southern District of Texas, petitioner and one Janet Watkins were charged with smuggling marihuana cigarettes into the United States from Mexico in violation of 21 U.S.C. 176 and with transporting the marihuana without having paid a transfer tax in violation of 26 U.S.C. 4744(a)(2). Petitioner went to trial alone before a jury and was convicted on the smuggling count in February 1962.[1] He was sentenced to imprisonment for a term of six years (R. 524).

1. The evidence at trial may be summarized as follows:

Petitioner and Janet Watkins, together with another couple, were returning to the United States from a week-end trip to Mexico when they were stopped at the Laredo International Bridge and searched by customs officials. An inspectress found, rolled in the elaborately-styled bouffant coiffure of Janet Watkins, five marihuana cigarettes and a quantity of seconal and benzedrine tablets (R. 238-239). Miss Watkins at first denied knowledge of the presence of these objects in her hair, explaining that petitioner (who was a professional hair-dresser) had combed her hair that morning (R. 152). Shortly thereafter she changed her story to say that she had combed her own hair (R. 153). At this time peti-

[1] A first trial had in December 1961 ended in a mistrial because of a hung jury.

tioner denied tha he had any knowledge of the marihuana in the girl's hair. An hour later, however, he called the investigators aside and told them he had placed the marihuana in the girl's hair that morning without her knowledge (R. 300-301), saying, "She doesn't know anything about this, she is a good kid, she wouldn't know marihuana if she saw it. It's mine, I don't—I can't let her take the rap" (R. 309-310). Petitioner named a known marihuana peddler in Nuevo Laredo, Mexico, as the person from whom he had bought ten cigarettes (R. 301).

Both petitioner and Miss Watkins were arrested (R. 298). At a Commissioner's hearing petitioner repeated his story that the marihuana was his and that he had placed it in the girl's hair without her knowledge (R. 303).

At the time of petitioner's trial, Janet Watkins had entered a plea of guilty to the tax count of the indictment. She testified on direct examination, however, that on the morning of the day she was arrested petitioner had combed her hair in the motel room they had shared. She said it was not unusual for him to arrange her hair, that there was no mirror, that she was not watching him, and the marihuana was not hers (R. 119, 145). She explained that she had falsely admitted to custom officials that she had combed her own hair after petitioner had denied complicity and it appeared that she was going to be charged anyway (R. 153-155).

On cross-examination, defense counsel asked Miss Watkins if she had been represented by counsel "at the time you entered a plea of guilty in this court-

room to the possession of marihuana, meaning these same five marihuana cigarettes that you now say you know nothing about * * *." The witness answered in the affirmative (R. 180).[2] Counsel then drew from her the admission that the plea was still in effect, that she had never undertaken to withdraw it, and that she did not intend to do so (R. 180-181). When he asked her if she pleaded guilty because she was guilty, the witness answered "Yes and No" (R. 181). She said, "I imported them, but I didn't know that I had them" (R. 189). Counsel then read to her the count of indictment charging smuggling "knowingly" and "wilfully." She conceded that this was what she had pleaded guilty to, that she had told the court that she understood it fully, and had conferred with counsel with respect to it (R. 191-192).[3] Asked if she knew what she was doing when she so assured the court, she answered "No Sir" (R. 192). Under continuous questioning she said the plea was entered "Because I am guilty" and when asked if she was "knowingly and wilfully" guilty, she answered "Yes, Sir" (R. 193). Minutes there-

[2] In his opening statement to the jury, defense counsel said that he intended to prove that Janet Watkins fixed her own hair on the morning of her arrest; that she was an habitual user of barbiturates and marihuana; that she admitted to customs agents that the marihuana was hers; that she had entered a plea of guilty after consultation with counsel; that at no time had she requested to withdraw the plea of guilty and that "up to now" it had not been withdrawn; that her admission exculpated others (R. 49-51).

[3] This was not the count to which Miss Watkins had entered the plea of guilty.

after she repeated her assertions that petitioner arranged her hair, that she could not see what he was doing, and that she only told the customs officers that she arranged her hair because "They wouldn't believe me when I was telling the truth" (R. 208, 218-219).

The court instructed, *inter alia*, that, in view of the fact that Miss Watkins had entered a plea of guilty to the offense upon which she and petitioner were jointly charged, the jury should give her testimony careful scrutiny and examination (R. 473). With regard to her plea the court said (R. 483-484):

> * * * the evidence and the records of this Court show in September Miss Watkins, being charged with this offense, having counsel of her own choice, stood here at this Bar and entered a plea of guilty. The evidence further shows that at the time, I asked her if she had put the marihuana in her hair, and she said she had not, and I then asked her, having some uncertainty as to the propriety of the plea of guilty, if she denied having put it there. I asked her if she knew it was there, and she stated to me that she did, whereupon I accepted her plea of guilty.

The court also noted that the defense had offered much evidence to discredit Miss Watkins, that her testimony had been impeached in many particulars, and that by her own admissions she had told differing versions of the matter. He instructed that this and other evidence must be considered in determining her credibility (R. 485).

The jury was further instructed that it could convict petitioner if it believed that he had acted alone

in placing the marihuana in the girl's hair without her knowledge or if it believed he had aided and abetted her in committing the offense.

2. On appeal the petitioner urged reversible error in the trial court's evidentiary rulings and in its instructions, including the direction that petitioner could be convicted if the jury found that he aided and abetted the commission of the offense by Janet Watkins within the meaning of 18 U.S.C. 2. The argument was made that knowledge on the part of Janet Watkins of the presence of marihuana in her hair was necessary proof to support such a theory and that there was no such proof. On May 30, 1963, the court of appeals affirmed the conviction.

3. On June 17, 1963, petitioner filed a petition for rehearing (R. 550-559) in which he contended that the government had expressly repudiated the theory that he could have aided and abetted Janet Watkins when, upon Miss Watkins' withdrawal of her plea, it dismissed the indictment. He urged that he had a right to a new trial "at which his guilt could be evaluated in accordance with what the prosecution now says it believes." In addition petitioner contended that Miss Watkins, in testifying at trial that she did not intend to withdraw or change her plea of guilty, was falsely misrepresenting "her hopes and intentions concerning punishment," and that the prosecution "must have knowingly tolerated" such misrepresentations. He noted that the trial judge told the jury that it had accepted Miss Watkin's plea after careful questioning and that nonetheless the same court subsequently permitted her to withdraw her

plea. He asked, as an alternative to a reversal of his conviction, that the court order a full inquiry by a district judge, other than the trial judge, into the promises and assurances extended to Miss Watkins by government lawyers—a hearing at which witnesses and all correspondence between the United States Attorney and the Department of Justice be produced. Attached to the petition for rehearing was a motion for leave to file a supplemental record including the district court docket sheet and motions and orders relative to the withdrawal of the plea of guilty and the dismissal of the indictment as to Miss Watkins (R. 560-568).

In response to the petition for rehearing, the government offered the certificates of two counsel who represented Miss Watkins (R. 485, 598), of government counsel in charge of both prosecutions (R. 592), the affidavit of Miss Watkins (R. 596), and the request by the United States Attorney to the Justice Department for authorization to dismiss the indictment (R. 577, 582).

In their certificates, Miss Watkins' counsel represented in substance that from the beginning the girl had maintained that she neither placed the marihuana in her hair nor knew it was there; that, although they had explained matters of intent and knowledge to her, they nevertheless felt that she had never fully understood but had had the idea that she was guilty merely because the marihuana was in fact transported in her hair; that they had advised her that it was very unlikely that a jury would believe

her story that she did not know she carried the marihuana in her hair and that her best interests would be served by entering a plea of guilty to the lesser charge of the tax count, provided the government would accept the plea and consider dismissal of the smuggling count carrying a mandatory five-year sentence. They pointed out that at the time Miss Watkins pleaded guilty on September 25, 1961, she seemed reluctant to state that she knew the cigarettes were in her hair, but when she did finally state that she knew that fact, the judge accepted her plea. One of her attorneys, Mr. Rawitscher, said that before petitioner's first trial, set for December 5, 1961, he talked to the probation officer and gained the impression that both the probation officer and Judge Connally thought Miss Watkins was a victim of circumstances. Miss Watkins' counsel heard her testify at the first trial and found that the substance of her testimony was essentially the same as that in her discussions with counsel. Immediately after the first trial, both of her counsel talked with Judge Connally. Counsel felt the responsibility to move for a change of plea and to try the case without a jury if necessary but this was not discussed with Miss Watkins.* Counsel took no action before petitioner's second trial, which was held on February 6, 1962. Thereafter

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* The letter of November 19, 1961, from Mr. Rawitscher to co-counsel, Mr. Freed, which disclosed counsel's plan to move for withdrawal of the plea after petitioner's trial was specifically mentioned in the Certificate of Mr. Freed filed by the government on July 17, 1963 (R. 596, 601). This letter is set forth as Appendix E to the petition.

counsel moved for withdrawal of the guilty plea which was granted on April 23, 1962. The indictment was dismissed in June 1962.

The affidavit of Miss Watkins (R. 596) recited that her testimony at the trial that she had not undertaken to, and did not intend to, change her plea was true; that she had not talked to her lawyers at that time about such a course of action; that she was surprised to hear that the charges against her had been dismissed; that no promises had been given her for her testimony; and that neither her lawyers nor government counsel had asked her to testify in any particular way.

In his certificate (R. 592), government counsel stated that at the time of her arraignment he had not believed Miss Watkins' statement that she did not know the marihuana was in her hair; that he advised her counsel that she could enter a plea to the tax count and the government would dismiss the smuggling count; that he had subpoenaed Miss Watkins to testify at each of petitioner's trials; that he had made no bargains for her testimony and in fact was not asked to do so by anybody; that between the first and second trials he had had no contact with Miss Watkins or her counsel, Mr. Rawitscher, except in connection with the issuance of the subpoena; and that the events at the second trial, coupled with knowledge that she had plead guilty to the tax count on the advice of her attorneys, led him not to object to the motion to withdraw Miss Watkins' plea of guilty.

The recommendation of the United States Attorney to the Department of Justice (concurred in by the Bureau of Customs and the District Probation Officer and approved on June 20, 1962) recited that the girl's story that she had not known the marihuana was in her hair had not been believed at first by any investigator but that now government counsel was convinced of her innocence. It noted that she had maintained her story throughout; that she had entered the plea of guilty to the tax count (the lesser offense) on the advice of her counsel, who told her that no jury would believe her story; that at the time of her plea she had not readily admitted her guilt; and that the court was now convinced of her innocence and had granted a motion to permit her to withdraw her plea. It described her as "naive and not too intelligent."

On July 22, 1962, the court of appeals denied *per curiam* the motion for leave to file a supplemental record and the petition for rehearing (Pet. App. C).

ARGUMENT

In his petition for rehearing in the court below, petitioner alleged that matters which occurred after the trial of his case (and which therefore were not available at the time of his trial) tended to show that he had been denied a fair trial. The proper way to raise such allegations is by motion in the district court under Rule 33, F.R. Crim. P., for a new trial based on newly discovered evidence. Under Rule 33 petitioner did not need the permission of the court of

appeals to make such a motion in the district court even though the case was on appeal. Only if the district court, after due consideration, decided to grant the motion would it be necessary to obtain a remand of the cause from the court of appeals.

To be sure, the government, which had been accused of wrongdoing, undertook to answer petitioner's contentions and to supply information indicating that there had been no prosecutional misconduct and that petitioner was not denied a fair trial. The court of appeals, however, not only denied the petition for rehearing, but denied petitioner's motion to supplement the record. There is thus no indication that the court of appeals considered the merits; its action is entirely consistent with the view that it believed that the matters alleged should have been raised in the trial court in the first instance.

There is no basis for petitioner's complaint that the court of appeals should have ordered a hearing on his allegations.* It is for the district court on a motion directed to it to decide whether petitioner's allegations required a hearing and, if a hearing is deemed

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* Petitioner argues as if the prosecution had sought to convince the jury that Miss Watkins was guilty of unlawfully importing marihuana concealed in her hair. The fact is, however, that Miss Watkins did insist at the trial that she did not know that marihuana was in her hair; it was the defense which tried to establish that the witness was guilty on the theory, outlined in its opening statement, that her admission of guilt exculpated others. As to the claim that Miss Watkins was not telling the truth because she testified that she did not intend to withdraw her plea, the certificates of counsel show that they had not discussed with her their intention of making a motion to withdraw the plea

necessary, to resolve the factual issues and determine the legal effect of the facts found. Petitioner still has ample opportunity to make such a motion.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA T. COOPER,
Attorneys.

NOVEMBER 1963

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[1] The judgment of conviction was filed on March 13, 1962. A motion for a new trial may be made within two years after the final judgment. Rule 33, F.R. Crim. P.

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